UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

CRITTENTON HOSPITAL MEDICAL CENTER[1]

Employer

and **CASE 7-RD-3300**

MARK DAVIS, An Individual

Petitioner

and

LOCAL 79, SERVICE EMPLOYEES INTERNATIONAL UNION

Union

APPEARANCES:

Donald H. Scharg, Attorney, of Bloomfield Hills, Michigan, for the Employer
Mark Davis, Petitioner, pro se
Richard Mack, Attorney, of Detroit, Michigan, for the Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

[1] The name of the Employer appears as amended at the hearing.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings[3] are free from prejudicial error and are hereby affirmed, except as noted in footnote 5.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Union contends the petition should be dismissed for the following reasons: (1) Mark Davis was improperly substituted for the original petitioner, now deceased; (2) the petition's failure to state a "unit involved" is a fatal defect; (3) the Board found that the Employer violated the Act in previously-filed unfair labor practice charges; and (4) the substantial representative complement of employees at the time the petition was filed is no longer present. The Employer contends that the substitution of the petitioner was proper, the unit involved is not in question, and the unfair labor practice charge and the delay in processing the petition are not proper bases to dismiss the petition. Davis testified that he was willing to be substituted as petitioner and believes the unit involved is the one in which he currently works. He took no position regarding the Union's dismissal arguments concerning the unfair labor practices and substantial representative complement of employees.

I find that the petition should not be dismissed. The substitution of Davis as petitioner was proper. Further, the unit involved, although not stated in the petition, is clear from the evidence in the record. In addition, because the unfair labor practice allegation filed with respect to the unit involved was untimely filed, and did not result in

[2] The Employer and Union filed briefs which were carefully considered. The Union's brief included a Motion to Dismiss. Prior to the hearing, the Union filed a document titled "Request to Dismiss Petition, or in the Alternative, to Conduct Show (sic) of Interest Investigation." That document was referred to during the hearing, but is not part of the record. The request to conduct a showing of interest investigation was renewed in a motion filed March 8, after the close of the hearing. That request and motion were denied by the Region by letter to the parties dated March 13. It is well settled that showing of interest is a matter of administrative determination and not litigable by the parties. ***Barnes Hospital***, 306 NLRB 201, fn. 2 (1992); ***Georgia Kraft Co.***, 120 NLRB 806, 807-08 (1958). The issues raised in the Motion to Dismiss will be discussed in the body of this decision.

[3] The hearing officer precluded the Union from asking certain questions of Petitioner regarding his knowledge of the original petition and the bargaining units at the Employer, and his substitution as Petitioner. On March 24, the Union filed a Motion to Reopen the Record to allow additional questioning of the Petitioner regarding his substitution. The hearing officer's rulings are affirmed and the Motion to Reopen the Record is denied. As discussed below, the record contains sufficient evidence regarding Mark Davis' substitution as Petitioner.

a finding of a violation by the Employer, dismissal of the petition on that basis would be inappropriate. Finally, while the passage of time since the petition was filed may have caused a significant turnover of employees in the unit, turnover is not a proper basis to dismiss the petition.

Background

The Union represents two units[4] of Employer employees: a unit of LPNs ("LPN unit") and a unit of technical service employees ("technical service unit"). The instant decertification petition was filed on July 18, 2001 by Allan Bull, an employee in the technical service unit at the time. The section of the petition for "unit involved" was left blank. However, the number of employees in the unit was listed as 238 and the expiration date of the current contract was listed as November 13, 2001.

On July 31, 2001, the petition was held in abeyance because of previously filed pending charges and outstanding complaint in Cases 7-CA-42979 et. al. The complaint alleged violations of Section 8(a)(5) of the Act relating to both the LPN and technical service units. The allegation regarding the technical service unit was filed on July 19, 2001, the day after the decertification petition was filed. The cases proceeded to trial. A decision by the administrative law judge (ALJ) recommended dismissal of the allegation regarding the technical service unit and a finding that the Employer violated the Act regarding the LPN unit allegations. Exceptions were filed to the decision, but none of them contested the recommendation regarding the technical service unit. The Board affirmed the ALJ's decision, noting in a footnote that no exceptions were filed regarding the technical service unit allegation. The Employer complied with the Board order, and the undersigned sent a letter to the Employer and Union stating that the unfair labor practice cases were closed. Thereafter, processing of the instant petition resumed.

Substitution of Petitioner

Bull passed away sometime in late 2005. Prior to that time, he telephoned Mark Davis, another employee in the technical service unit. Davis testified that Bull mentioned that the decertification petition was going to be moving forward and asked Davis if he would pick it up because Bull was on medical disability and no longer working at the Employer. Davis said yes, and Bull asked Davis to call the Board agent handling the case. He did so. He later appeared voluntarily at the hearing and was willing to be substituted as Petitioner.

The Union contends that this substitution was improper. The Union does not appear to contend that substitution of a petitioner is per se prohibited. Instead, it argues

[4] A third unit of approximately 70 dietary employees represented by the Union works on the Employer's premises, but is employed by another employer, HDS Services.

that it was not permitted to fully explore the circumstances of the substitution and raises the issue that the Region solicited Davis to serve as petitioner.

In ***Weyerhauser Timber Co.***, 93 NLRB 842 (1951), the petitioner in a decertification case became a supervisor after the petition was filed. The petition was still processed. The union filed a motion to dismiss. The Board denied the motion. In doing so, the Board noted that the petitioner filed the petition on behalf of employees and was only "nominally involved" in the case. It held that "once a petition [is] filed, responsibility for all further action in the matter devolved upon the Board" to investigate the petition, conduct a hearing, and direct and supervise any election. ***Id.*** at 844. Similarly, in ***Northwestern Photo Engraving Co.***, 106 NLRB 1067, fn. 1 (1953), the Board denied a union's request to dismiss a petition when the petitioner died after the close of the hearing. Again, the Board held the individual petitioner was acting on behalf of employees who requested that the petition proceed.

Bull filed the petition on behalf of employees. Later, Bull and Davis, an employee in the same unit, spoke about the petition. Davis then contacted the Region. It is not relevant whether the Region solicited his substitution.

The Union assets in its brief that in ***Northwestern Photo***, the employees came to the Region and requested that the petition proceed. It then contends that, as a result, ***Northwestern Photo*** establishes that the Region may not solicit a new petitioner. It argues that if this Region did so, the petition should be dismissed. The Board's footnote in ***Northwestern Photo*** makes no factual representation that the employees came to the Region. It is silent as to who initiated the contact between the Region and employees. Further, it makes no difference. A decertification petition was filed and the Board had all responsibility for processing it. ***Weyerhauser Timber Co.***, supra, at 844. The petitioner died. If a decertification petition can proceed without any substitution for the original petitioner, the voluntary substitution of another employee in the same unit who had prior contact with the Region regarding the petition, even if solicited by the Region, is certainly permissible. See e.g. ***Deffenbaugh Disposal Services***, 2004 WL 1804090 (July 30, 2004) (the deceased petitioner's wife and personal representative was substituted as petitioner). To find otherwise would be to the prejudice of the employees in the unit. ***Weyerhauser***, supra, at 844.

Unit Involved

The Union contends that because the "unit involved" section of the petition is blank and the original petitioner is no longer available to explain what unit was covered by the petition, the petition should be dismissed. In decertification petitions, only the existing certified or recognized unit is appropriate. ***Minneapolis Star and Tribune Company***, 115 NLRB 1300 (1956). Here, there are sufficient facts in the record to determine that the decertification petition was filed for the technical service unit. First,

Bull was, and Davis is, an employee in that unit. Second, the number of employees listed in the petition for the unit is 238. The parties stipulated that when the petition was filed, the technical service unit had at least 200 employees, while the LPN unit represented by the Union had approximately 15 employees. Third, the petition lists the date of expiration of the current collective bargaining contract as November 13, 2001. That is the same date the collective bargaining contract expired for the technical service unit. The record does not reveal nor does the Union argue that the LPN unit had a collective bargaining contract expire on the same date. In fact, while the LPN contract in effect at the time is not in the record, the two LPN contracts negotiated since the petition was filed have effective dates from May to May. (May 19, 2002-May 19, 2005, and May 29, 2005-May 27, 2007).[5]

The petition should have been amended to insert the unit involved. However, the failure to do so does not warrant dismissal of the petition. Based on the evidence in the record, it is clear that the unit involved is the technical service unit. No one seriously argues otherwise.

Unfair Labor Practices

The Union further contends that the petition should be dismissed because it was filed after unfair labor practices were committed. The Union first relies on unfair labor practices involving the LPN unit that were found by the Board to have merit. ***Crittenton Hospital***, 343 NLRB No. 81 (Nov. 23, 2004). Those violations involved, inter alia, unilateral changes in the Employer's health benefit plan. The Union notes that this unilateral change was employer-wide and, thus, also implemented for the technical service unit. It points out that the complaint allegation regarding the technical service unit was dismissed pursuant to Section 10(b), not the merits.

I find the Union's argument unpersuasive. The Union's amended charge involving the technical service unit was filed more than six months after the Employer's alleged unilateral change. In finding no nexus between the allegations regarding the technical service unit and those regarding the LPN unit, the ALJ noted the allegations involved different bargaining unit employees, different contract negotiations, and factually different conduct by the Employer. He therefore found the allegation did not satisfy the "closely related test" set forth in ***Redd-I, Inc.***, 290 NLRB 1115 (1988), and ***Nickles Bakery of Indiana***, 296 NLRB 927 (1989). ***Crittenton Hospital***, supra, slip op. at 9-10. Based on this finding by the ALJ and the lack of exceptions filed to it by the Union, it would be improper for me to find that the Employer committed unfair labor practices involving the technical service unit.

[5] The hearing officer denied the admission of these two LPN contracts based on relevance and had them placed in a rejected exhibit file. The contracts have some relevance as to their effective dates. Accordingly, the hearing officer's ruling on this issue is overruled and the contracts are admitted into the record.

The Union contends that dismissal also is appropriate pursuant to ***Douglas-Randall, Inc.***, 320 NLRB 431 (1995), because the unfair labor practice charges were "settled" following a trial before the ALJ. This contention is wrong. The charges were not settled. They were litigated, resulting in a Board Decision and Order.

In ***Douglas-Randall, Inc.***, the Board reviewed the history of the procedures for handling decertification petitions when the parties have resolved concurrent unfair labor practice allegations by entering into a settlement agreement. It reversed the then-current law and held that a settlement agreement in which the employer agrees to recognize and bargain with the union will require final dismissal of a decertification petition filed after the onset of the alleged unlawful conduct. However, the Board also dealt with procedures to be followed when a settlement agreement is not the method for termination of the unfair labor practice allegations. Relevant to the instant matter, the Board held that unfair labor practice charges litigated and found to be without merit allow a subsequently filed petition to be subject to reinstatement. ***Id.*** at 435. The allegations regarding the technical service unit were litigated and found to be without merit. While the basis for finding no merit was Section 10(b), the matter was nontheless litigated. Therefore, because the allegations were found to be without merit, reinstatement and processing of the petition was appropriate.

Substantial Representative Complement

Finally, the Union argues that the petition should be dismissed because many employees in the unit at the time of the filing of the petition are no longer employed at the Employer, and because there are some new, deleted, and renamed classifications in the unit. In making this argument, the Union cites to a case involving an expanding unit and whether the complement of employees at the time the petition was filed constitutes a substantial and representative segment of the complement to be employed within the foreseeable future.

It is unfortunate that significant time has elapsed since this petition was filed and that many employees from that time are likely no longer employed at the Employer. However, this case is not equivalent to an expanding unit situation and the passage of time is not a basis for dismissing the petition. The results of the election will reveal the desires of the present employees as to representation by the Union. See ***Chester Valley, Inc.***, 266 NLRB 480 (1983) (the Board rejected an argument that a second election should not be held because of the lapse of time since the petition was filed (more than four years), contraction of the unit, and turnover of employees), ***Sheraton Hotel Waterbury***, 316 NLRB 238 (1995).

Conclusion

For the reasons stated above, and based on the record as a whole, I conclude that the petition should not be dismissed.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed boiler operators, maintenance I, II, and III employees, anesthesia aides, linen aides, supply aides, patient escorts, nursing assistants, patient care associates, unit secretaries, perioperative billing and data entry clerks, boarding clerks, receiving clerks, CSR clerks, anesthesia techs, cardiovascular techs I (EKG), central processing technicians, central processing technicians-certified, electro-neurodiagnostic techs (EEG), endoscopy techs, equipment techs, PCA emergency employees, OB technicians, rehab technicians, surgical techs, clinical lab assistants, and lead clinic lab assistants employed by the Employer at 1101 West University Drive, Rochester, Michigan; but excluding all other employees, including professional employees, and guards and supervisors as defined in the Act.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 29th day of March, 2006.

"/s/[Stephen M. Glasser]."

(SEAL) /s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **3** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **April 5, 2006.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by **April 12, 2005.**

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.